

Applicant had met the burden of persuasion on all statutory criteria for the issuance of the permit. The evidence was of the type normally relied upon in courts of law and in administrative proceedings.

The reliance upon staff expertise, challenged by Mr. Onstad, is expressly provided for in the Montana Administrative Procedures Act, MCA §§ 2-4-612(7), 2-4-614(g), and staff experts will not be disregarded because of alleged insufficiencies in formal education in the United States. As noted below, this Final Order is subject to judicial review pursuant to MCA title 2, chapter 4, part 7.

Therefore, based upon the files, records, and proceedings herein, the Department makes the following:

ORDER

1. That Application for Beneficial Water Use Permit No. 49371-g43Q be granted to Gregory C. MacDonald to appropriate 275 gpm up to 75 ac-ft of water for sprinkler irrigation purposes. The source of supply shall be a ground water well, the waters thereof diverted at a point in the SE1/4 NW1/4 NE1/4 of Section 14, Township 1 South, Range 25 East, in Lot 3, Block 1 of Golden Meadows Subdivision, Second Filing, in Yellowstone County. The place of use shall be 23.68 acres of land located in the N1/2 NE1/4 of Section 14, Township 1 South, Range 25 East in Yellowstone County. In no event shall these waters be diverted prior to May 1 of any given year nor subsequent to November 1 of any given year. The priority date for this permit shall be July 1, 1982 at 11:44 a.m.

2. That this permit be subject to the following express conditions, limitations and restrictions:

A. This permit is subject to all prior and existing rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize diversions by the permittee to the detriment of any senior appropriator.

B. The permittee shall not divert more water than is reasonably required for the purposes described herein. At all times when water is not reasonably required for these purposes, the permittee shall cause and otherwise allow the waters to remain in the source of supply.


C. Nothing herein shall be construed to affect or otherwise reduce the permittee's liability for damages which may be caused by the exercise of this permit. Nor does the Department of Natural Resources and Conservation in issuing this permit acknowledge any liability for damages caused by the exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

D. The permittee shall diligently adhere to the terms and conditions of the permit. Failure to adhere to the terms and the conditions may result in the revocation of this permit.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act, by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 16th day of September 1983.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6605

Box 30436
Billings, Montana 59107
August 22, 1983

Mr. Kent B. Roberts
Dept of Natural Resources
32 S. Ewing
Helena, Montana 59620

RECEIVED

AUG 23 1983

Dear Sir:

Re. your decision on water permit no. 49371-g430 MONT. DEPT. OF NATURAL
RESOURCES & CONSERVATION

In my opinion, there were no "facts" whatsoever presented at the hearing on June 6, 1983 by Gregory McDonald, substantiating his request for water rights. I therefore find your decision unacceptable.

Since you saw fit to supply a witness to testify against me, I am exploring the legal responsibilities you may have incurred by this action.

It would appear that much credibility was given to your witness, Ms. Hanneman due, as you stated, to her superior educational qualifications. I was amused at this statement since our educational system has deteriorated to the extent that the federal government felt they had no option but to become involved.

Should your decision be allowed to stand, we will let the courts decide just what your liability is for any damage arising from this decision.

Yours truly,



Marvin Onstad

MO/a

CASE # 49371

AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Mary R. Lohrman, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on September 19, 1983, she deposited in the United States mail, certified, an order by the Department on the Application by Gregory C. MacDonald, Application No. 49371-g430, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Gregory C. MacDonald, First Federal Savings & Loan Building, Suite 216, 3rd Ave. N., Billings, MT 59101
2. Marvin Onstad, P.O. Box 30436, Billings, MT 59107
3. Delbert P. & Reba F. Shaw, P.O. Box 20561, Billings, MT 59104
4. Zack & Virginia Garretson, 3106 Canyon Dr., Billings, MT 59102
5. Keith Kerbel, Billings Field Office (inter-department mail)
6. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Mary R. Lohrman

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 19th day of September, 1983, before me, a Notary Public in and for said state, personally appeared Mary Lohrman, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Lohr
Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3/1/85

CASE # 49371

Example
BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	ORDER GRANTING
NO. 49371-G43Q BY GREGORY C.)	CONTINUANCE
MACDONALD)	

* * * * *

Based upon all the files and records herein,

IT IS HEREBY ORDERED:

That the contested case hearing in the above-entitled matter originally scheduled for Friday, April 22, 1983, at 10:00 a.m. in the Boardroom of the Yellowstone County Courthouse in Billings, Montana, is continued. The hearing has been rescheduled for Monday, June 6, 1983, at 10:00 a.m. in the Federal Building, 316 N. 26th, 5th floor, Billings, Montana.

DONE this 8th day of April, 1983.

Kent B. Roberts

Kent B. Roberts, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962

MEMORANDUM

Marvin Onstad, an objector in this matter, filed a request to continue this hearing with Keith Kerbel, the Area Office Supervisor for the Department's Billings Field Office (on March

31, 1983); and, with Gary Fritz, the Administrator for the Department's Water Resources Division (on April 4, 1983). Mr. Kerbel and Mr. Fritz properly submitted the letters (which are attached to this Order) to the Hearing Examiner for his consideration. According to the letters, the main reason for Mr. Onstad's request is that he wants to hire a geologist and therefor needs additional time to prepare his case. Mr. Onstad has made a showing of "good cause", the legal test used for determining whether a continuance should be granted. Thus, the Hearing Examiner has granted a continuance, although there are at least two reasons why Mr. Onstad's request could have been denied.

First, the request was improperly filed with the Department. The Notice of Hearing and Appointment of Hearing Examiner, issued by the Administrator on March 30, 1983 and served on the parties, stated in paragraph 2 that "[a]ll future correspondence, questions and motions pertaining to the above-matter [the contested case hearing] shall be directed to the Hearing Examiner...." The Administrator's order was very clear that the person to whom motions should be filed with is the Hearing Examiner. The reason for this procedure is quite simple. Neither the Administrator nor the Billings Area Office Supervisor has the authority to grant continuances. Only the Hearing Examiner has that authority.

Second, Mr. Onstad made no showing that his request was mailed either to the applicant or the other two objectors of record, a burden which the requesting or moving party must

bear. A fundamental principle of due process is that all parties to an administrative hearing must be given at least an opportunity to contest another party's motion before the Hearing Examiner or the Administrative Law Judge makes his ruling. The other parties to this hearing were denied that opportunity although it is doubtful that they could have shown that there are compelling reasons to hold the hearing as originally scheduled.

For future reference, the parties are advised that requests for continuances or other motions should be in writing, addressed to the Hearing Examiner and served on all parties of record. Requests or motions not filed in this manner will be dismissed without prejudice and promptly returned to the party.

K.B.R.

RECEIVED

Box 30436

Billings, Montana 59107

April 1, 1983

APR 04 1983

MONT. DEPT. OF NATURAL
RESOURCES & CONSERVATION

Gary Fritz, Administrator
Dept. of Natural Resources, Water Resources Div.
32 S. Ewing
Helena, Montana 59620

Dear Sir:

Please be advised that it will be impossible for me to prepare my case by April 22.

It appears it may be necessary for me to engage a geologist to make a study of the project in order for me to make an adequate defense of my water rights. This, along with the fact that I not only operate a sizeable tire business, but have a 1600 acre farm which my son and I operate, would make the date unacceptable as we have been unable to do any field work to date due to the inclement spring weather.

The earliest possible date for me to make a proper defense will be June.

I trust it will not be necessary for me to resort to the courts to get the postponement.

Yours truly,



Marvin Onstad

CASE # 49371

Box 30436
Billings, Montana 59107
March 31, 1983

Mr. Keith D. Kerbel
State of Montana, Dept. of Natural Resources
1537 Ave. D, Suite #135
Billings, Montana 59102

Dear Mr. Kerbel:

Please be advised that some time in June will be the earliest possible date for me to have my case properly prepared for the water rights hearing you plan to hold.

Along with a sizeable tire business, we also farm 1600 acres, and due to the adverse spring weather, we have been unable to begin our farming operations.

In order for adequate evaluation to be made of Gregory McDonald's operation, I will need to spend some time in checking the permit that was granted Mr. McDonald re. sewage disposal etc, when the trailer court was established.

Since this is a very serious threat to our water system, I must have adequate time to prepare my case. It may be necessary for me to bring in a licensed geologist to assist me, and this will be time consuming.

Some time in June I will be happy to appear to present my case.

Very truly yours,

Marvin Onstad
Marvin Onstad

MO/a

RECEIVED
APR - 1 1983
DEPT. OF NATURAL RESOURCES
AND CONSERVATION
BILLINGS OFFICE

CASE # 49371

AFFIDAVIT OF SERVICE
ORDER OF CONTINUANCE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Cheryl L. Wallace, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 8, 1983, she deposited in the United States mail, certified return receipt mail, an order by the Department on the Application by Gregory C. MacDonald, Application No. 49371-g430, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Gregory C. MacDonald, 3200 King Ave. W., Billings, MT 59102
2. Marvin Onstad, 3112 King Ave. W., Billings, MT 59101
3. Delbert R. & Reba F. Shaw, P.O. Box 20561, Billings, MT 59104
4. Zack & Virginia Garretson, 3106 Canyon Dr., Billings, MT 59102
5. Keith Kerbel, Billings Field Office (inter-department mail)
6. Kent B. Roberts, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Cheryl L. Wallace

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 8th day of April, 1983, before me, a Notary Public in and for said state, personally appeared Cheryl L. Wallace, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy John

Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3/1/85

CASE # 49371

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* * * * *

CASE # 49371

STATEMENT OF ISSUES

The issue in this proceeding is whether the Applicant should be granted a permit to appropriate ground water from a well.

Based upon all of the proceedings herein, the Hearing Examiner makes the following:

FINDINGS OF FACT

I. Procedural History

1. On July 1, 1982, the Applicant filed with the Department an application seeking authorization to appropriate 275 gallons per minute (gpm) up to 75 acre-feet (ac-ft) per year for sprinkler irrigation purposes from May 1 to November 30, inclusive, of each year. A ground water well is claimed as the source of supply, the waters thereof to be diverted via a pump at the SE1/4 NW1/4 NE1/4 of Section 14 of Township (T) 1 South (S), Range (R) 25 East (E), Lot 3, Block 1 of Golden Meadows Subdivision, Second Filing, in Yellowstone County. The place of use of the water is proposed to be in the N1/2 NE1/4 of Section 14, T1S, R25E of Yellowstone County. The Applicant proposes to appropriate ground water for lawn watering, tree watering and general landscape watering of 23.68 acres of land located in Golden Meadows Subdivision.

2. On December 15, 22 and 29, 1982, the Notice of Application (Notice) was published in the Billings Gazette, a

newspaper published in Billings, Montana. The Notice set February 2, 1983, as the deadline for filing objections to the application.

3. On January 7, 1983, an objection to the granting of the application was filed with the Department by Zack and Virginia Garretson. The Garretsons are holders of Water Rights Certificate No. 47764-g430. This water right allows the Garretsons to divert 50 gpm up to 1.5 ac-ft from January 1 to December 31, inclusive, of each year for domestic purposes. The source of water supply is a ground water well. The place of use and point of diversion are in the SW1/4 of Section 12, T1S, R25E in Lot 12, Block 22 of Lampman Subdivision, in Yellowstone County. The priority date of the Garretsons' water right is June 19, 1982. The Garretsons noted in their filed objection that they are concerned about the Applicant's proposed appropriation affecting their water supply.

4. On January 10, 1983, an objection to the granting of the application was filed with the Department by Marvin Onstad. Mr. Onstad is the owner of Water Right Certificate Nos. 6143-g430 and 6142-g430. Water Right No. 6143 allows Mr. Onstad to divert 30 gpm up to 1.5 ac-ft from January 1 to December 31, inclusive, of each year for industrial purposes. Additionally, Water Right No. 6142 allows Mr. Onstad to divert 90 gpm up to 60 ac-ft from January 1 to December 31 for domestic and fire protection purposes and from November 1 to March 1 for recreational purposes

(ice rink and condenser cooling). The source of the water supply for both water rights are two separate ground water wells located in the NW1/4 of Section 13, T1S, R25E in Lot 2 of Studer Subdivision in Yellowstone County. The priority date for both water rights is August 6, 1975. Mr. Onstad asserted in his objection that he believes that his wells have already been adversely affected by a nearby city sewer ditch and he would be further affected by the Applicant's proposed appropriation.

5. On February 4, 1983, an objection to the granting of the application was filed with the Department by Delbert and Reba Shaw. The Shaws are owners of Water Right Certificate No. 30863-g43Q. This water right allows the Shaws to divert 25 gpm up to 1.5 ac-ft from January 1 to December 31, inclusive, of each year for domestic purposes. The source of water supply is a ground water well located in the SW1/4 SW1/4 of Section 12, T1S, R25E in Lot 8, Block 2 of Lampman Subdivision in Yellowstone County. The priority date for the Shaws' water right is December 11, 1980. The Shaws stated in their objection that they are concerned about the protection of their water rights. The Shaws did not appear at this hearing.

6. The location of the Applicant's proposed well and the Objectors' wells are depicted on Figure 1, a copy of which is attached hereto and made a part of this Proposal.

7. On March 30, 1983, the Administrator of the Department's Water Resources Division issued a Notice of Hearing, setting a date for a contested case hearing for April 22, 1983. A copy of

the Notice of Hearing was served on the same date by mail on all the parties of record.

8. On April 4, 1983, Marvin Onstad filed with the Department a request for a continuance of the contested case hearing. The main reason for Mr. Onstad's request is that he wanted to hire a geologist and, therefore, needed additional time to prepare his case.

9. On April 8, 1983, the Hearing Examiner issued an order granting the continuance and rescheduling the contested case hearing for June 6, 1983.

10. No geologist or other qualified scientific experts appeared or presented testimony for Mr. Onstad at this hearing.

II. Geohydrology of the Area

11. The proposed well of the Applicant and the finish wells of the Objectors utilize a Quaternary terrace as their aquifer. This aquifer is unconfined and generally consists of cobbles and pebbles in a sandy matrix with clay layers interspersed therein. The thickness of this terrace material in this geologic area ranges from approximately 30-35 feet in depth.

12. The Quaternary terrace is underlain by sediments of the Colorado group. This group is comprised primarily of dark colored shales with some sandstone and siltstone beds occurring locally. Because of the predominance of shale, the sediments constitute a relatively impermeable layer below the Quaternary terrace materials, and thus wells are finished off above the sediments, in the terrace gravels.

13. The groundwater flow in this area moves towards the Yellowstone River, in a northwest to southeast direction.

III. Expert Analysis of the Affects of the Proposed Appropriation

14. The Department's geohydrologist expert prepared a report analyzing the Applicant's proposed appropriation in terms of draw down at the proposed well and the radius of affect of the Applicant's proposed pumping activity. This analysis is based on the requested 75 ac-ft per year at 275 gpm, which, with continuous pumping, would take approximately 62 days for the Applicant to appropriate this amount of water. Since the Applicant stated on the record at the hearing that he will not be pumping continuously, the calculated draw downs will be greater than what will actually occur in the field.

15. In order to calculate draw down, a transmissivity value ("T") and a storage coefficient ("S") need to be determined. A T value (transmissivity is the rate in which water is transmitted through the aquifer) of 24,000 gpd/ft was used based upon 1973 pumping test data from this aquifer. A storage coefficient of 0.1 was used since this is a water table aquifer and is composed of fairly clean gravels.

16. Using these T and S values, the maximum extent of draw down effects would radiate approximately 1800 feet from the Applicant's proposed well. This figure is based on continuous pumping for 62 days, which in practice, will not be the actual pumping schedule. As such, the actual draw down occurring will

be less than the calculated draw down. The nearest objector is approximately 2300 feet away from the Applicant's proposed well, and therefore, even with continuous pumping, the objector's well would not be affected.

17. The Applicant will be using this water for landscaping purposes. Because of this type of use, much of the diverted ground water will infiltrate back into the terrace aquifer. Since recharge to this aquifer is normally accomplished by both direct precipitation and irrigation activity, some of the water actually taken out of the system will be returned by the Applicant's proposed water use.

The Applicant will be utilizing his proposed appropriation from May through November. During much of this time, irrigation is occurring and area water levels are accordingly high, relative to other times of the year. Therefore, any affects that may be generated by the Applicant's proposed pumping will be offset by these higher water levels.

18. Theodore F. Benes, a licensed water well driller, test pumped two of the Applicant's wells--water well Nos. 2 and 3. Mr. Benes test pumped well No. 3 (the proposed well) on April 25, 1983 for a period of nine hours at rates of 130 gpm up to 240 gpm. He then monitored the ground water level in well No. 2, (a test well), located 300 feet northeast of well No. 3. Mr. Benes found the ground water level to be 13 feet 8 inches below ground level at well No. 2 previous to the April 25th test pumping; and, also found the ground water level to be 13 feet 8 inches below

ground level at well No. 2 at the conclusion of the test pumping period on April 25. Mr. Benes then measured the ground water level in well No. 2 on April 26, 1983, and found the ground water level to be 13 feet 8 inches below ground level. Thus, the test pumping produced zero draw down at well No. 2 after nearly nine hours of continuous pumping on well No. 3 at rates of 130-240 gpm.

19. The Applicant's proposed means of diversion are reasonable and customary for his intended appropriation.

20. There are unappropriated waters available for the Applicant's proposed use in the amounts that he seeks and during the time he seeks the use of the water.

IV. The Phase II Interceptor Sewer System

21. During the fall of 1982, the Phase II Interceptor Sewer System was placed along the western and southern edges of Billings. Because of the ground water encountered in the sewer drain trench, the sewer construction company dewatered the trench before the sewer pipe was laid. Approximately 1000 feet of the trench was opened at one time, and 10 wells at intervals of about 120 feet were pumped in order to accomplish the trench area dewatering.

22. The Objectors who appeared at this hearing indicated that their water supply has decreased since the installation of the sewer drain.

23. Prior to this hearing, the Department's geohydrologist expert field investigated the area noted on Figure 1 in order to determine if a relationship existed between the water supply reduction and the sewer line; and, particularly, if the sewer line was acting to dewater the area. The field investigation was directed towards determining the ground water flow pattern. This was done based on the premise that if the sewer line development was still somehow acting to dewater the area, ground water would be moving towards the sewer line, instead of past the line and on towards the river. Nineteen static water level readings were taken during the field investigation. The readings were taken on domestic wells, wells that provide lawn and garden sprinkling supplemental to the city water system, and wells that supply water to commercial establishments.

24. The results of this credible study demonstrate that the ground water flow is still "normal", i.e., it flows in a northwest to southeast direction. Thus, significant volumes of ground water are not moving into the trench area with the sewer line acting to dewater the area.

25. The problems occurring with certain wells in relation to well yields are due more to sanding in of the wells than with any current reduction in water levels. In general, the sanding in of wells is due to excessive pumping, which is a common problem in this area. Well efficiency can be (and has been) returned to its original levels by pumping the sand out of the wells.

26. The Department's geohydrologist, Ms. Debra Hanneman, was the only expert testifying in this hearing. Conflicts in the record concerning testimony on matters of geohydrology and other similarly related subjects, are resolved in favor of the expert testifying on behalf of the Department. As compared to other witnesses presenting scientific evidence, Ms. Hanneman possessed superior educational qualifications, experience and access to, and familiarity with, the sources of information relevant thereto.

PERTINENT STATUTORY EXCERPTS

MCA §85-2-311 provides in part that the Department must issue a permit if the Applicant proves by substantial credible evidence that "(1) there are unappropriated waters in the source of supply (a) at times when the water can be put to the use proposed by the applicant; (b) in the amount the applicant seeks to appropriate; and (c) throughout the period during which the applicant seeks to appropriate, the amount requested is available; (2) the rights of a prior appropriator will not be adversely affected; (3) the proposed means of diversion, construction, and operation of the appropriation works are adequate; (4) the proposed use of water is a beneficial use; [and] (5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved...."

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Montana Department of Natural Resources and Conservation has jurisdiction over the parties and the subject matter of this hearing.

2. The Department gave proper notice of this hearing, and all relevant substantive and procedural requirements of law or rule have

been fulfilled and, therefore, the matter was properly before the Hearing Examiner.

3. The Applicant proved by substantial credible evidence that there are unappropriated waters in the aquifer at times when the water can be put to the proposed use; in the amount proposed for appropriation; and, throughout the period during the proposed appropriation, the amount requested is available.

4. The Applicant proved by substantial credible evidence that the rights of a prior appropriator will not be adversely affected.

5. The Applicant proved by substantial credible evidence that the proposed means of diversion, construction, and operation of his appropriation works are adequate; that the proposed use of water is a beneficial use; and, that the proposed use will not interfere unreasonably with other planned uses or development for which a permit has been issued or for which water has been reserved.

6. Delbert and Reba Shaw failed to appear at the hearing and are in default pursuant to Administrative Rule of Montana § 1.3.214(1).

Based upon the foregoing Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

1. That Application for Beneficial Water Use Permit No. 49371-g43Q be granted to Gregory C. MacDonald to appropriate 275 gpm up to 75 ac-ft of water for sprinkler irrigation purposes. The source of supply shall be a ground water well, the waters thereof diverted at a point in the SE1/4 NW1/4 NE1/4 of Section 14, Township

1 South, Range 25 East, in Lot 3, Block 1 of Golden Meadows Subdivision, Second Filing, in Yellowstone County. The place of use shall be 23.68 acres of land located in the N1/2 NE1/4 of Section 14, Township 1 South, Range 25 East in Yellowstone County. In no event shall these waters be diverted prior to May 1 of any given year nor subsequent to November 1 of any given year. The priority date for this permit shall be July 1, 1982 at 11:44 a.m.

2. That this permit be subject to the following express conditions, limitations and restrictions:

A. This permit is subject to all prior and existing rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize diversions by the permittee to the detriment of any senior appropriator.

B. The permittee shall not divert more water than is reasonably required for the purposes described herein. At all times when water is not reasonably required for these purposes, the permittee shall cause and otherwise allow the waters to remain in the source of supply.

C. Nothing herein shall be construed to affect or otherwise reduce the permittee's liability for damages which may be caused by the exercise of this permit. Nor does the Department of Natural Resources and Conservation in issuing this permit acknowledge any liability for damages caused by the exercise of this permit, even if such damage is a necessary and unavoidable consequence of the same.

D. The permittee shall diligently adhere to the terms and conditions of the permit. Failure to adhere to the terms and the conditions may result in the revocation of this permit.

DONE this 16th day of August, 1983.

Kent B. Roberts

Kent B. Roberts, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 449 - 3962

NOTICE

Pursuant to MCA Section 2-4-623 (5), the Department is required to serve its final decision on each party by first class mail.

MEMORANDUM

I.

The Applicant in this case proved by substantial credible evidence all the criteria necessary for the granting of a permit. See, Conclusions of Law 3, 4, and 5; see also, In re Diamond City Mining Co. (Dept. Final Order, May, 1983) and In re East Bench Grain and Machinery (Dept. Final Order, March, 1983). In particular, the Applicant clearly demonstrated that his proposed appropriation will not adversely affect the rights of prior appropriators. Section 85-2-311(2), MCA. The "evidence" that supports this lack of adverse affect is primarily the testimony from the Department's geohydrologist, Ms. Debra Hanneman. See, Dept. Exs. 6 and 7; see also, Findings 11-17 and 21-25. Because

CASE # 29371

Ms. Hanneman has earned a Masters of Science and Bachelors of Science degrees in geology, her education allows her to render, as matter of law, expert opinions on geohydrology matters. The Hearing Examiner has given great weight to Ms. Hanneman's expert opinions since such opinions were formulated only after she field investigated the area twice, reviewed standard geological documents for the Yellowstone County area and calculated the expected drawdown with standard scientific techniques. See, Finding 26 ; See also, Dept. Exs. 6 and 7.

The Objectors to this proceeding did present some oral testimony in an attempt to rebut Ms. Hanneman's highly technical reports. Much of this testimony was given by Mr. Onstad, who was, as noted by Mr. MacDonald at the hearing, testifying far outside the scope of his expertise. No evidentiary foundation was laid by Mr. Onstad which established that he was qualified to render scientific opinions on geohydrology matters. The types of opinions and scientific conclusions expressed by Mr. Onstad should have been rendered by a qualified expert with geohydrology training. See generally, Findings 8 and 10. The Hearing Examiner acknowledges that Mr. Onstad does have many years of experience with water wells but that is insufficient, in itself, to establish that he is legally qualified to render expert opinions on complex questions of geohydrology. Accordingly, the Hearing Examiner gave no weight to Mr. Onstad's "expert" testimony.

Even considering ad arguendo that Mr. Onstad's statements are

admissible (and, therefore, could be given some weight), the Proposed Order of this case would not be changed. The credible testimony of Ms. Hanneman was, after listening to Mr. Onstad's oral testimony, that the conclusions and opinions in her field investigation report would still remain the same.

II.

At the hearing and on the record, Mr. MacDonald expressed his concern and frustration regarding the lack of procedural rules to guide parties in these permit hearings. In addressing this valid concern, the Hearing Examiner explained on the record that a set of proposed procedural rules had been drafted; and, that the Board of Natural Resources and Conservation had approved, on May 6, 1983, that these proposed rules be published in the Administrative Register (to allow for public comment).

At this date, the proposed rules still have not been published in the Register. For the past four months, the Hearing Examiner has repeatedly urged Department officials privately, and now does so publicly, to publish a fair and complete set of procedural rules as soon as possible.

K.B.R.

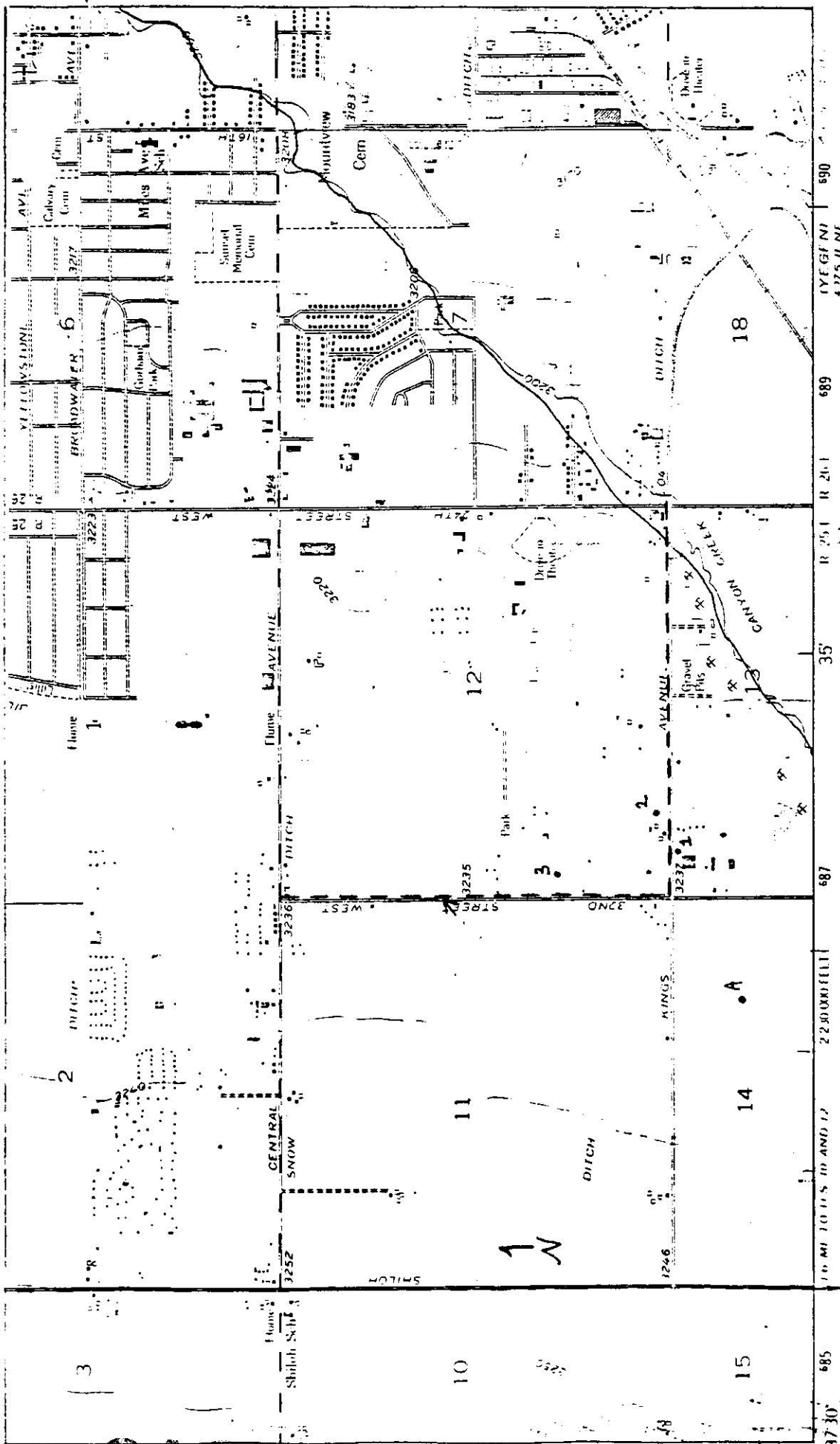


Figure 1. Location of Applicant's P.O.D. / Objectors' Wells

- 3 Garretson wells

--- Interceptor Sewer System

- A Applicant's proposed P.O.D.
- 1 Onstad well (No. 6143-g 43Q)
- 2 Shaw well

Scale 1" = 2000'

AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Mary Lehman, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on August 16, 1983, she sent Certified United States Mail, a Proposal for Decision by the Department on the Application by Gregory C. MacDonald, Application No. 49371-g430, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Gregory C. MacDonald, First Federal Savings & Loan Building, Suite 216, 3rd Ave. N., Billings, MT 59101
2. Marvin Onstad, P.O. Box 30436, Billings, MT 59107
3. Delbert R. & Reba F. Shaw, P.O. Box 20561, Billings, MT 59104
4. Zack & Virginia Garretson, 3106 Canyon Dr., Billings, MT 59102
5. Keith Kerbel, Billings Field Office (inter-department mail)
6. Kent B. Roberts, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Mary Lee Lehman

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 16th day of August, 1983, before me, a Notary Public in and for said state, personally appeared Mary Lee Lehman, known to me to be the Hearing Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Robert V. Whiteman
Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires October 30, 1985

CASE # 49371